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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

FRANCIS A. TOMCSIK, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

- AND APPENDICES -

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QUESTION PRESENTED

WHETHER THE DISTRICT COURT ERRED IN ITS APPLICATION OF MICHIGAN LAW WHERE IT FOUND THAT RESPONDENT'S ACTIONS WERE NOT NEGLIGENT.

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Francis Tomcsik, by and through his attorneys, John C. Talpos and Robert F. Davisson, petitions on Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals (App. A, *infra*, page A-1) is No. 89-2179. The opinion of the district court (App. C, *infra*, page C-1) is not reported.

JURISDICTION

The judgment of the Court of Appeals (App. A, *infra*, page A-1) was entered on October 30, 1990. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Federal Tort Claims Act, 28 USC § 1346 *et seq.*:

"(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the inter-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in any amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978 [41 USCS Sections 607(g)(1), 609(a)(1)]. For the purpose of this paragraph, an express or implied

contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

"*(b) Subject to the provisions of chapter 171 of this title [28 USCS Sections 2671 et. seq.], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.*

"(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

"(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

"(e) The district courts shall have original jurisdiction of any civil action against the United

States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States District court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954 [26 USCS Sections 6226, 6228(a), 7426, 7428, 7429].

"(f) The district courts shall have exclusive original jurisdiction of civil actions under Section 2409a [28 USCS Section 2409a] to quiet title to an estate or interest in real property in which an interest is claimed by the United States." (Emphasis added.)

2. MCL 257.603; MSA 9.2303:

* * *

"(b) The driver of an authorized emergency vehicle when responding to an emergency call, but not while returning from an emergency call, may exercise the privileges set forth in this section, subject to the conditions of this section.

"(c) The driver of an authorized emergency vehicle may:

(1) Park or stand, irrespective of the provisions of this act.

(2) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation.

(3) Exceed the prima facie speed limits *so long as he does not endanger life or property*.

(4) Disregard regulations governing direction of movement or turning in specified direction.

"(d) The exemptions granted in this section to an authorized emergency vehicle shall apply only when the driver of the vehicle while in motion sounds an audible signal by bell, siren, air horn, or exhaust whistle as may be reasonably necessary except as provided in subsection (e), and when the vehicle is equipped with at least 1 lighted lamp displaying a flashing, oscillating, or rotating red or blue light *visible under normal atmospheric conditions from a distance of 500 feet in a 360 degree arc . . .*" (Emphases added.)

3. MCL 257.632; MSA 9.2332:

"The speed limitation set forth in this chapter shall not apply to vehicles when operated with due regard for safety under the direction of the police when traveling in emergencies or in the chase or apprehension of violators of the law or of persons charged with or suspected of a violation, nor to fire department or fire patrol vehicles when traveling in response to a fire alarm, nor to public or private ambulances when traveling in emergencies * * * . *This exemption shall not however protect the driver of the vehicle from the consequences of a reckless disregard of the safety of others.*" (Emphasis added.)

STATEMENT OF THE CASE

Petitioner, Francis A. Tomcsik, Jr., filed a complaint against the United States of America, particularly the Federal Bureau of Investigation, pursuant to the Federal Tort Claims Act, 28 USC § 1346 *et seq*. Petitioner sustained serious injuries as a result of the negligent conduct of certain FBI agents who were engaged in a high speed pursuit of a fugitive in an automobile which struck Petitioner on August 28, 1986.

A five-day bench trial was held in the United States District Court, Eastern District of Michigan, before the Honorable Anna Diggs Taylor in April, 1989. Proposed findings of fact and conclusions of law were submitted by both Plaintiff and Defendant and final oral argument was heard on June 15, 1989. On September 11, 1989, a Memorandum Opinion and Order was entered by the Court dismissing Plaintiff's suit.

On February 14, 1990, the Plaintiff appealed to the United States Court of Appeals for the Sixth Circuit. The Court of Appeals heard oral arguments on September 25, 1990 and entered an order affirming the district courts decision on October 30, 1990.

Plaintiff now petitions on a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

The relevant facts as found by the Trial Judge are as follows (C-1–C-6):

> "This unfortunate accident occurred on the morning of August 28, 1986. Farod Mallory, the driver of the car which struck the plaintiff, was a known 'enforcer' for the Young Boys, Inc., a Detroit street gang,[1] which has twice been prosecuted in

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[1] Mallory had previously been arrested as a minor for his involvement with Young Boys, Inc. and remanded to the custory of the juvenile authorities.

this court as a major distributor of narcotics. (See, Criminal Case Nos. 82-80591 and 87-80648). As such, he was considered by law enforcement personnel to be a dangerous individual. According to evidence adduced at trial, at least three warrants for Mallory's arrest had been issued by the time of the accident. These warrants had led to extensive investigations into his whereabouts by law enforcement personnel, including a local Special Task Force comprised of local police and FBI agents. These Special Agents were responsible for apprehending felons wanted on murder, robbery and assault charges.[2]

"In August of 1984, a warrant for Mallory's arrest had been issued in connection with a Michigan murder charge. After he fled the jurisdiction to evade arrest, an unlawful flight warrant was also issued. From approximately August, 1984 through August, 1985, FBI Special Agent Prince Ross had been actively engaged in efforts to locate Mallory. In furtherance of that year-long investigation and search, Ross had interviewed witnesses, family, and known associates of Mallory, and conducted daily spot checks of various places known to be frequented by Mallory. In 1985, Mallory had finally been arrested in that matter when he was found hiding in a closet of his mother's house. Subsequent to that arrest he was interviewed by Ross on behalf of federal authorities. Although he was later acquitted of the charges of that arrest, Mallory knew of Ross's ongoing interest in his activities.

"In March of 1986, another arrest warrant was issued for Mallory in connection with a criminal

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[2] Special agents Prince Ross and Kenneth Kaiser of the FBI, and Sgt. Dennis Richardson and Officer Julie Bloomfield of the Detroit Metropolitan Police (Detroit Police) were all assigned to the Special Task Force in the Detroit area.

sexual conduct charge. Upon his disappearance, a federal warrant for unlawful flight to avoid prosecution was again issued and the search was again assigned to Ross. Ross had reactivated all of his efforts of the prior year, enlisted the assistance of FBI offices in other cities in which Mallory had been sighted, and continued daily spot checks at the homes of Mallory's family, girlfriend, and known associates throughout the spring and summer of 1988. It is with this backdrop that the events leading to the accident of August 28th must be viewed.

"On the morning of August 28, 1986, Ross embarked upon what he described as a routine day of investigating the whereabouts of a number of fugitive felons, including Farod Mallory. Ross stated that he had not planned to spend an inordinate amount of time looking for Mallory because he had no reason to believe that Mallory was even in Detroit at the time. He knew from his sources, however, that Mallory was in and out of the city, and included his Mallory spot checks in each day's routine.

"At about 10:30 a.m., Ross stopped at the home of Mallory's sister, Lagina Crawford. He was driving a blue two-toned Chevrolet Impala. The car was outfitted with emergency equipment consisting of flashing hazard lights, a siren, a portable blue oscillating light and both FBI and Detroit Police handheld radios. Ross saw a silver-colored car in the Crawford driveway; the same car that he had seen at Mallory's girlfriend's house earlier that morning. The sister's house was on the west side of Plainview Road, north of Fenkell. The driveway was on the south side of the house, screened by a hedge approximately four feet high on the property line. From across Fenkell, Ross could see the top of the

parked car above the hedge. Ross decided to stay. To undertake his surveillance, he parked his car on the east side of Plainview facing north, just south of Fenkell. Shortly thereafter, a blue Pontiac 6000 containing officers Richardson and Bloomfield and driven by Kaiser pulled up. Their unmarked car had been leased by the FBI specifically for undercover use by the Task Force and they were equipped with a portable blue oscillating light and FBI and Detroit Police hand-held radios. The Pontiac was not equipped with alternating flashing lights or a siren, as was Ross's car. Government witnesses testified that the rented vehicle which Kaiser drove was not intended for use as an emergency vehicle pursuant to MCL 257.603; MSA 9.2303, *infra*. Ross explained to the others that he planned to monitor the house briefly, in case someone leaving or entering it might lead him to information concerning Mallory. After less than ten minutes of conversation among the officers the Pontiac departed, leaving Ross alone in his car to watch the house.

"Within fifteen minutes after the Pontiac had departed, and just as Ross was himself preparing to leave, he saw the heads of two persons getting into the silver car parked in the Crawford driveway. The car then emerged from the driveway and proceeded south on Plainview towards Ross. As the car passed through the intersection at Fenkell and approached Ross' car, he was able to clearly see that there were two persons in the car, and that Mallory was driving, with a woman in the front passenger seat. When the two cars were roughly parallel, Mallory apparently recognized Ross from their prior meeting, accelerated, and sped away down Plainview. Ross immediately turned his car around to commence pursuit. He activated his flashing hazard

lights and siren and placed the portable blue oscillating light on the dashboard. He first radioed Kaiser on his hand-held radio for assistance, giving Mallory's direction and a description of the car. Ross could not personally request back-up assistance from marked Detroit Police units because he was unfamiliar with the Detroit Police code system. He could, however, hear police officer Richardson relaying his information to the Detroit Police dispatcher over the Detroit Police radio. During this period, Mallory remained fully within Ross's view as Mallory turned right onto Outer Drive and then left, southbound on Evergreen Road. Ross testified that his intention was to maintain eye contact on the suspect, and to continue to broadcast his whereabouts, but not to attempt an arrest. In response to Ross' radio call, Richardson informed Ross via the Detroit Police radio, that he and Kaiser were near Interstate 96 and Evergreen and would turn north on Evergreen to meet him and the Mallory car. Ross also used his FBI radio to inform any other FBI agents in the vicinity, as well as FBI central dispatch, of Mallory's location.

"Meanwhile, Mallory continued south on Evergreen approaching speeds estimated as high as 70-90 miles per hour between intersections. He slowed at the intersections, however, in order to maneuver his car through traffic. Ross testified that his FBI car reached speeds of 40-50 miles per hour, which was fast enough to keep Mallory in view.

"As Kaiser's car proceeded north on Evergreen, its occupants spotted Mallory's silver car approaching them at the intersection of Schoolcraft and Evergreen. Before Kaiser reached that intersection, at mid-block, he placed a blue oscillating light on the

dash of his car and turned a sharp left, maneuvering across the center lane so as to block the two southbound lanes of Evergreen. All three officers exited that vehicle as Mallory came through the intersection of Schoolcraft against a red traffic signal. Richardson ran to the front of their car with revolver and badge drawn and identified himself as a policeman to Mallory's oncoming car. Mallory had deaccelerated [sic] somewhat, coming through the intersection. As he approached Richardson in the street behind the blue Pontiac, however, he sped up, swerving in an apparent attempt to run Richardson down. Richardson dove out of the way to avoid being hit, but not before noticing what appeared to be a handgun in Mallory's lap. Mallory then drove around the Kaiser car, entering the northbound lane of traffic in so doing, and bypassed the obstacle altogether, speeding south.

"Ross was several car lengths behind Mallory when he witnessed the apparent attempt at a stop. Then, after observing that Mallory had not been stopped, Ross also continued past Kaiser's car to keep Mallory in sight. Kaiser and the others returned to their car and proceeded south on Evergreen, far behind both Mallory and Ross, and did so without exceeding the posted speed limit or going through any red traffic signals. Mallory's car continued down Evergreen until it came to a crashing halt in the intersection of Joy and Evergreen Roads. After disregarding a red traffic signal, Mallory broadsided the vehicle driven by plaintiff Francis Tomcsik, which had been heading east across the intersection, with a green light on Joy Road. Ross was still about a block behind, but saw the accident occur. As he approached the accident scene, Ross

> also observed Mallory climb across the woman in the passenger seat and out of the window of his car, and run into an alley. No marked police cars had yet arrived. Ross then stopped his car and undertook pursuit of Mallory on foot. He cornered Mallory in the alley and, after a struggle, subdued, arrested, and returned him to the scene of the accident. By that time, Kaiser's car and several marked police cars were on the scene."

Farod Mallory's vehicle crashed into Frank Tomcsik's vehicle at a very high rate of speed. Mr. Tomcsik's vehicle was demolished and he was seriously and permanently injured. Mr. Tomcsik was taken by EMS to Oakwood Hospital where his injuries were diagnosed as traumatic subcutaneous emphysema, pneumothorax, hemothorax, multiple rib fractures, flail chest, fractured clavicle, and multiple pelvic fractures. During the course of hospitalization following the accident, he was also diagnosed by Dr. Schwin, a neurologist, as having post-concussion amnesia as a result of a cerebral dysfunction. In addition, Mr. Tomcsik suffered the loss of several teeth and injuries to his face and mouth. He spent several weeks in intensive care and was ultimately discharged on September 30, 1986. Thereafter, he was confined to his home for approximately four months and required the assistance of others to perform all his daily living requirements. Even at the present time he occasionally uses a cane and neck brace. Respondents medical expert at trial, Dr. Steven Korotkin, a board-certified cardiologist, was of the opinion that Frank Tomcsik did not sustain a myocardial injury and does not have coronary artery disease. He believes instead that the pulmonary injuries Frank Tomcsik sustained were a result of lung trauma and not cardiac contusion or heart failure. Both Petitioner's present treating physician, Dr. Kaufman, and Dr. Korotkin have opined that Mr. Tomcsik's chest pain at the present time is most likely musculoskeletal in nature stemming from the traumatic injuries of this accident.

Petitioner appeals the conclusions drawn from the Court's finding of fact that Respondent was not negligent.

REASON FOR GRANTING THE WRIT

THE DISTRICT COURT ERRED IN ITS APPLICATION OF MICHIGAN LAW WHERE IT FOUND THAT THE RESPONDENT'S ACTIONS WERE NOT NEGLIGENT.

The district court in this case erred in finding Respondent's actions were not negligent. Ordinarily the Appeals Court will not overturn findings of fact by the Trial Judge unless it is left with a definite and firm conviction that a mistake was made. *Thompson* v *National Railway Passenger Corp*, 621 F2d 814 (CA 6, 1980). The question of negligence is a mixed question of fact and law and, therefore, the Court of Appeals should review the issue *de novo*. *Gregory* v *Longview School District*, 811 F2d 1307 (CA 9, 1987). In the present case, this Court should find that a mistake was made and the lower court decision should be overturned.

First, the lower court drew several erroneous conclusions from the facts it found.

The first conclusion concerns the placement and visibility of the emergency light used by Agent Ross. Although the light could have been placed on the top of his car, providing greater visibility, Agent Ross elected the easier method of simply setting the light on his dashboard. Plaintiff's expert testified (T–p. 591) that the light placed on the roof could be seen in a 360-degree arc at a higher plane and without any glare or refraction from the windshield. A light on the dashboard provided only limited visibility.

Additionally, Plaintiff's expert testified (T–p. 598) that a siren was less effective if within the hood, as it would be muffled by being enclosed and having the grille in front of it.

Whether Agent Ross' blue emergency light was visible on his dash and whether his siren could be heard is of importance not only to the conclusion of negligence; it also points out the lack of credibility of the two FBI agents. Kaiser and Richardson did not see lights or hear sirens on Ross' car when they saw it coming southbound on Evergreen. Richardson said Ross did not have his siren on before passing them. Contrary to Ross' testimony, Agent Kaiser testified at deposition that Ross did not have his blue light on when he saw Ross' vehicle behind Mallory's vehicle southbound on Evergreen before the Schoolcraft intersection. Sometime after Kaiser's and Ross' depositions on April 14, 1988, Kaiser changed his deposition testimony. Petitioner contends these changes were deliberately contrived to coincide with Ross' testimony. Kaiser stated on deposition at pages 25 and 26 that he "had visual contact with Farod's car and Prince behind him," and that "At that point, I don't believe there were any lights or sirens going on at that time." Kaiser subsequently changed that testimony to read "[A]t that point I could not see Prince's light or hear his siren because he was behind Farod. My attention was actually focused on Farod." Kaiser testified at trial that if the portable light was on in Ross' car, it may have been obscured to him by cars in front of Ross' car more than if it had been placed on top of Ross' car. Kaiser added that if the siren was on, he could not hear it because there was radio traffic going in his vehicle and the windows were up. If the light was on and Kaiser could not see it, this testimony confirms Petitioner's expert's testimony relating to the limitations of the emergency equipment on Ross' vehicle. If the light was not on, then Agent Ross was not telling the truth. The Trial Judge, on p. 17 of the Memorandum Opinion and Order (C-15–C-16), attempted to reconcile the conflicts, stating the agents may not have heard or seen the signals and that their credibility was not affected by the alterations. Petitioner believes this is error.

Another critical area of testimony was changed by Agent Kaiser. Agent Ross testified at trial (T–p. 138) that Mallory ran the red light at Schoolcraft by making his way through traffic. Agent Kaiser testified that Mallory stopped or slowed for the light at Schoolcraft. Again, Agent Kaiser altered his deposition testimony to reflect the testimony of Agent Ross. Kaiser testified at deposition on page 25, lines 18 through 21:

> "A. He was struck at the light at Schoolcraft and Evergreen southbound.
> Q. Stopped in traffic?
> A. Yes."

That testimony was changed as follows:

> "A. I believe he was stopped when I first saw him, but he continued moving through the intersection."

Again on page 26, Kaiser testified in April:

> "Q. Farod is in the traffic southbound on Evergreen?
> A. On Evergreen, yes.
> Q. Stopped at the light?
> A. Yes, sir.
> Q. And you also recognize Prince's car farther behind?
> A. Yes, sir.
> Q. Also in traffic?
> A. Yes, sir."

That testimony was changed to read:

> "A. When I first saw him I believe he was stopped at the light."

And even again on page 27 of the deposition Kaiser testified:

"Q. Did Farod stop for the light at Schoolcraft?
A. Yes, he did."

That testimony was changed at a later date to read:

"A. I'm not sure if he was stopped. As I remember . . ."

Both the use of emergency equipment and the speed of the Mallory vehicle are important to the issue of whether the FBI agents were negligent.

Another critical fact is whether Agent Ross was in hot pursuit or surveillance of Mallory, Ross testified that he was chasing Mallory, who was travelling at high speeds. Richardson and Kaiser testified at deposition that they did not believe Ross was in hot pursuit at that point. They believed that Ross was only conducting a "moving surveillance" at that point. Ross testified at trial that he was only chasing Mallory to keep up with him. It is improbable that Farod Mallory would have interpreted a speeding vehicle with lights and sirens as only a "surveillance." Special Agent Kaiser at this point turned his car southbound joining in the pursuit, following Ross in the chase with no siren. For the first time attempts were made to contact Detroit Police dispatch and FBI Central.

At the time of impact, bystander Royetta King testified that Ross' vehicle was about two cars behind the Mallory vehicle. She also watched Ross' car pull out into the northbound lane following the first car. She presumed the second car to be a police car, althugh it had no markings, and she recalls hearing a siren. So that Agent Kaiser's testimony would be a reflection of Agent Ross' testimony, Kaiser again changed his deposition testimony regarding the events following the collision. At trial they failed to answer questions in a forthright manner and were repeatedly evasive and unresponsive to counsel's questions. A trial is, or should be, a search for truth. By their oath and

their position with the United States Government as law enforcement officers, FBI agents are duty-bound to testify honestly, fairly, and not to be evasive when answering questions directed to them by counsel.

Kaiser had a copy of the Michigan Pursuit Driving Research and Training Manual in his desk. Section 15.4 of the General Procedures prohibits the secondary unit in pursuit (Kaiser's vehicle) from attempts to stop pursued suspects by "blockading" or "heading off" their vehicle with a police vehicle. Respondent's agents completely ignored these local policies espoused by Respondent's own expert. Ross does not consider that Mallory's travelling at speeds of 70-90 miles per hour, weaving in and out of heavy traffic, evading a roadblock, barely missing hitting other vehicles, and ignoring control signals, was a highly dangerous activity. In fact, Agents Anthony, Ross and Kaiser all refused to give a straight answer when asked whether they considered a chase under these circumstances to be dangerous. Whatever term they came to use, this was "an attempt to block a road with automobiles in a situation where a car was expected to proceed along a road with considerable traffic." The procedure in the suggested guidelines requires that the entire road be blocked by cars. Respondent's expert Dr. McKinnon acknowledged on cross-examination that it is against the rule of the Detroit Police Department and Michigan Pursuit Driving Research and Training Manual for a police officer to turn into an oncoming lane of traffic, but Agent Kaiser did just that and then he and Richardson, totally unprotected, walked into the path of Mallory's car. This stop was contrary to all police training for such situations.

The district court's conclusion that there was no negligence on the part of the FBI was error and is not supported by the district court's own findings of fact.

Petitioner's claim was brought pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346 *et seq*. Federal Courts

are bound, under the terms of this Act, to apply the law of the jurisdiction where the tort occurred, in this case Michigan. See, *Fries* v *United States*, 170 F2d 726 (CA 6, 1948).

There are several relevant Michigan statutes and cases. MCL 257.603; MSA 9.2303 provides in part:

> "(b) The driver of an authorized emergency vehicle when responding to an emergency call, but not while returning from an emergency call, may exercise the privileges set forth in this section, subject to the conditions of this section.
>
> "(c) The driver of an authorized emergency vehicle may:
>
> (1) Park or stand, irrespective of the provisions of this act.
>
> (2) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation.
>
> (3) Exceed the prima facie speed limits *so long as he does not endanger life or property*.
>
> (4) Disregard regulations governing direction of movement or turning in specified direction.
>
> "(d) The exemptions granted in this section to an authorized emergency vehicle shall apply only when the driver of the vehicle while in motion sounds an audible signal by bell, siren, air horn, or exhaust whistle as may be reasonably necessary except as provided in subsection (e), and when the vehicle is equipped with at least 1 lighted lamp displaying a

> flashing, oscillating, or rotating red or blue light *visible under normal atmospheric conditions from a distance of 500 feet in a 360 degree arc . . .*" (Emphases added.)

MCL 257.632; MSA 9.2332 provides:

> "The speed limitation set forth in this chapter shall not apply to vehicles when operated with due regard for safety under the direction of the police when traveling in emergencies or in the chase or apprehension of violators of the law or of persons charged with or suspected of a violation, nor to fire department or fire patrol vehicles when traveling in response to a fire alarm, nor to public or private ambulances when traveling in emergencies * * * . *This exemption shall not however protect the driver of the vehicle from the consequences of a reckless disregard of the safety of others.*" (Emphasis added.)

Fiser v *City of Ann Arbor*, 417 Mich 461, 339 NW2d 413 (1983), set forth the standard under which this case must be analyzed. *Fiser* is a remarkably similar case to the instant case.

In *Fiser* several police officers were involved in the high-speed chase of an individual who had failed to obey an officer's order to stop. The individual being chased struck plaintiff, causing serious injury. The trial court in *Fiser* granted the defendant's Motion for Summary Judgment. Plaintiff appealed and the Michigan Supreme Court set forth the framework for high-speed police chase cases.

First, the Court, citing *McKay* v *Hargis*, 351 Mich 409, 88 NW2d 456 (1958), pointed out that the officers' conduct must be compared to that which a reasonably prudent man would exercise in the discharge of official duties.

Next, the Court noted that for the statute which exempts the police from normal traffic laws (MCL 257.603) to apply, the officers must reasonably believe that an emergency existed.

Next, the Court held that even where the officers are exempt by law from obeying most of the rules of the road, they still *must not endanger life or property*. The officers still must drive with due regard for the safety of others. See, *Kalamazoo* v *Priest*, 331 Mich 43, 49 NW2d 52 (1951).

Finally, the *Fiser* Court said that after an emergency is shown to exist, there are still six other factors to consider.

In examining those six *Fiser* factors, four of the six would preclude conducting a high-speed chase under the circumstances which were presented to Agent Ross on August 28, 1986.

Factor 1: *Speed of the pursuit.* Although neither FBI agent nor the trial court would so admit, travelling at 79-90 miles per hour in a neighborhood of residences and small businesses is, in and of itself, extremely dangerous. Agent Ross, the pursuer, reached speeds of 40-50 miles per hour, which was in excess of the speed limit, merely to keep Mallory in sight.

Factor 2: *Area of the pursuit.* This factor involves the location and population of the pursuit. Again, the pursuit route was a neighborhood of residences and small businesses. A high-speed chase in such an area presents substantial risk of harm to innocent third parties such as that which ultimately occurred.

Factor 3: *Weather and road conditions.* The weather was warm and dry and the roadway ranged from one to two lanes in each direction with some turning and parking lanes.

Factor 4: *Presence of pedestrians and other traffic.* There was no evidence of pedestrians other than at the

corner where the accident occurred. However, there was testimony as to other traffic and Mallory's maneuvering through stopped traffic at intersections prior to the accident.

Factor 5: ***Presence or absence of audible and visible warnings.*** If the emergency light and siren on Agent Ross' vehicle were activated, they were unable to be heard or seen by Agent Kaiser. The light displayed by Agent Ross was on the dashboard, not on the roof where it would be visible from 500 feet in a 360-degree arc, which is required by Michigan statute.

Factor 6: ***Reason for the pursuit.*** The FBI agents were pursuing a felon. The Respondents and the trial court concluded that this reason alone excused the Respondent's conduct. Under the applicable standard of *Fiser*, this was not sufficient. The other factors would indicate negligence on the part of Respondents. The Trial Judge incorrectly concluded because the situation was not as egregious as *Fiser*, due to lower speeds, dry pavement, no one-way streets and the pursuit of a felon, not a traffic violator, that the *Fiser* standards had been met. This is clearly not the case.

One of the primary areas where the district court erred as a matter of law was in first finding that an emergency existed. The Court stated in its Memorandum Opinion and Order, pp. 15-16 (C-14–C-15):

> "In the case at bar, the government has amply met its burden of showing that an emergency existed. There can be no dispute that Farod Mallory was a violent and dangerous wanted felon, intimately associated with the notorious Young Boys, Inc. gang which dealt in illegal drugs and death. Ross was familiar with Mallory's participation in the gang as an enforcer; a member of what was known as the 'A-Team'. From mid '84 through mid '85 and

for six months of '86, Ross had searched for him. He knew that Mallory travelled between and among several states other than Michigan to evade arrest. He had safe-houses and contacts in several cities.

"Plaintiff has argued that the second search for Mallory, undertaken in 1986, was not as difficult as has been claimed because reports had been made to the FBI from informants in the drug world that Mallory had been seen in Detroit during the weeks just prior to August 28, 1986. Assuming, *arguendo*, that the information was true and that Mallory was on occasion in the city, the fact is that Mallory remained a fugitive and that the best efforts of the Task Force had failed to locate him. To say that Mallory could have been apprehended another day because he had previously been sighted in the city ignores the reality of the situation; that Mallory had eluded law enforcement up to that point, and was a person whose capture was a matter of significant governmental priority. His free presence in the city presented a very substantial danger to the populace. It was reasonable, under the circumstances, for Ross to conclude that this was an emergency situation triggering the excusatory providions of MCL 257.632; MSA 9.2332, and this Court finds as a matter of fact and law that it was. The situation is totally distinguishable from that of *Fiser*, in which the chase had developed from a simple attempted traffic stop.

"Having determined that an emergency existed, the Court now turns to the question of whether this pursuit was conducted with due regard for the safety of others."

Petitioner submits that this conclusion is wrong as a matter of law. No emergency existed. It is true the officers were

trying to arrest a felon, but this does not mean an emergency existed. The man had been at large for over a year. On the date of the incident Mallory was not in any way endangering the life or property of others. No dangerous or emergency situation existed until the officers initiated the chase. As a matter of law there was no emergency.

Finally, even if *arguendo* there was an emergency, the officers still had a legal duty to proceed with due regard for the safety of others. *Fiser, supra*, 472. Obviously, they breached their duty. The officers' conduct was the direct cause of Petitioner's serious injuries.

The lower courts paid inadequate attention to the *Fiser* factors and the circumstances surrounding the chase and the subsequent attempt at a blockade, which led to the accident which seriously injured Mr. Tomcsik. The pursuit was simply not conducted with due regard for the safety of Petitioner and other innocent bystanders, and the trial court incorrectly concluded that the Respondent, through its agents, did not act negligently.

CONCLUSION

The district court incorrectly applied Michigan law when it concluded that the Respondent, through its agents, did not act negligently and, thus, dismissed the Petitioner's complaint. The Federal Court of Appeals for the Sixth Circuit directly conflicted with the Michigan Supreme Court in affirming the district court opinion. Petitioner respectfully requests this Honorable Court to reverse the determination of the district court and find the Respondent acted negligently, and remand this cause to the

district court for a determination of the Petitioner's damages.

Respectfully submitted,

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Attorneys for Petitioner

Dated: February 13, 1991

APPENDICES TO PETITION FOR CERTIORARI

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APPENDIX A

OPINION

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

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(United States Court of Appeals — Sixth Circuit)

(Filed October 30, 1990)

(FRANCIS TOMCSIK, Plaintiff-Appellant, v. UNITED STATES OF AMERICA, Defendant-Appellee — No. 89-2179; ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN)

BEFORE: KENNEDY and KRUPANSKY, Circuit Judges; and ENGEL, Senior Circuit Judge.

PER CURIAM.

Plaintiff-appellant, Francis Tomscik (Tomscik), appeals the entry of judgment against him following a bench trial of his Federal Tort Claims Act negligence action against the United States. In his complaint, Tomcsik alleged that a certain agent of the FBI, Prince Ross (Ross), in collaboration with several officers of the Detroit Police Department, engaged a fugitive named Farod Mallory (Mallory) — a dangerous "enforcer" for the Young Boys narcotics crimes ring, wanted for questioning in three murders — in a high speed automobile pursuit through residential streets in the City of Detroit. This pursuit ended when Mallory was

apprehended, after his vehicle entered an intersection and struck the automobile in which Tomcsik was traveling. Tomcsik suffered severe, debilitating injuries in the collision, and initiated this suit under the Federal Tort Claims Act alleging that the accident occurred as a result of the negligence of the federal agent in pursuing Mallory.

The case was tried without a jury, and the district court concluded as a matter of fact that, in light of his official duties and in light of the circumstances, Ross had exercised reasonably prudent care in chasing Mallory. In reaching this decision, the court applied the standard for police officer negligence enunciated in *Fiser* v *Ann Arbor*, 417 Mich. 461, 339 N.W.2d 413 (Mich. 1983).

Upon consideration of the briefs, the arguments of counsel, the record developed at trial, and the applicable case law, this court is of the opinion that the district court's factual findings were not clearly erroneous, and that its judgment is therefore not subject to reversal on appeal. Accordingly, the judgment of the district court is hereby **affirmed** for the reasons stated in the court's memorandum opinion of September 11, 1989.

APPENDIX B

JUDGMENT

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Filed September 11, 1989)

(FRANCIS A. TOMCSIK, JR., Plaintiff, vs. UNITED STATES OF AMERICA, Defendant — Civil Action No. 87 72396)

This matter having come before the Court, and the Court having entered its Memorandum Opinion and Order; now, therefore,

IT IS ORDERED that Plaintiff's Complaint be and hereby is DISMISSED.

IT IS SO ORDERED.

/s/ ANNA DIGGS TAYLOR
United States District Judge

Dated: SEPTEMBER 11, 1989

APPENDIX C

MEMORANDUM OPINION AND ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated September 11, 1989)

(FRANCIS A. TOMCSIK, JR., Plaintiff, vs. UNITED STATES OF AMERICA, Defendant — CIVIL NO. 87 72396)

The plaintiff, Francis A. Tomcsik, Jr., filed this action against the defendant United States of America, particularly the Federal Bureau of Investigation (FBI), pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346, *et seq.* Tomcsik claims to have sustained serious injuries as a proximate result of the negligent conduct of certain FBI agents who were engaged in a high speed pursuit of the fleeing automobile which struck plaintiff. The automobile which struck Tomcsik's car was driven by one Farod Mallory who, at the time of the accident, was a fugitive from the law. This writing constitutes the findings of fact and conclusions of law made by the Court following a bench trial in this matter. For the reasons set forth in the discussion below, the Court finds that under the circumstances in their totality, the defendant's actions were not negligent and therefore the United States may not be held liable for plaintiff's undisputedly serious injuries.

This unfortunate accident occurred on the morning of August 28, 1986. Farod Mallory, the driver of the car which struck the plaintiff, was a known "enforcer" for the Young Boys, Inc., a Detroit street gang[1] which has twice been

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[1] Mallory had previously been arrested as a minor for his involvement with Young Boys, Inc. and remanded to the custody of the juvenile authorities.

prosecuted in this court as a major distributor of narcotics. (See, Criminal Case Nos. 82-80591 and 87-80648). As such, he was considered by law enforcement personnel to be a dangerous individual. According to evidence adduced at trial, at least three warrants for Mallory's arrest had been issued by the time of the accident. These warrants had led to extensive investigations into his whereabouts by law enforcement personnel, including a local Special Task Force comprised of local police and FBI agents. These Special agents were responsible for apprehending felons wanted on murder, robbery and assault charges.[2]

In August of 1984, a warrant for Mallory's arrest had been issued in connection with a Michigan murder charge. After he fled the jurisdiction to evade arrest, an unlawful flight warrant was also issued. From approximately August, 1984 through August, 1985, FBI Special Agent Prince Ross had been actively engaged in efforts to locate Mallory. In furtherance of that year-long investigation and search, Ross had interviewed witnesses, family, and known associates of Mallory, and conducted daily spot checks of various places known to be frequented by Mallory. In 1985, Mallory had finally been arrested in that matter when he was found hiding in a closet of his mother's house. Subsequent to that arrest he was interviewed by Ross on behalf of federal authorities. Although he was later acquitted of the charges of that arrest, Mallory knew of Ross's ongoing interest in his activities.

In March of 1986, another arrest warrant was issued for Mallory in connection with a criminal sexual conduct charge. Upon his disappearance, a federal warrant for unlawful flight to avoid persecution was again issued and

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[2] Special agents Prince, Ross and Kenneth Kaiser of the FBI, and Sgt. Dennis Richardson and Officer Julie Bloomfield of the Detroit Metropolitan Police (Detroit Police) were all assigned to the Special Task Force in the Detroit area.

the search was again assigned to Ross. Ross had reactivated all of his efforts of the prior year, enlisted the assistance of FBI offices in other cities in which Mallory had been sighted, and continued daily spot checks at the homes of Mallory's family, girlfriend, and known associates throughout the spring and summer of 1988. It is with this backdrop that the events leading to the accident of August 28th must be viewed.

On the morning of August 28, 1986, Ross embarked upon what he described as a routine day of investigating the whereabouts of a number of fugitive felons, including Farod Mallory. Ross stated that he had not planned to spend an inordinate amount of time looking for Mallory because he had no reason to believe that Mallory was even in Detroit at the time. He knew from his sources, however, that Mallory was in and out of the city, and included his Mallory spot checks in each day's routine.

At about 10:30 a.m., Ross stopped at the home of Mallory's sister, Lagina Crawford. He was driving a blue two-toned Chevrolet Impala. The car was outfitted with emergency equipment consisting of flashing hazard lights, a siren, a portable blue oscillating light and both FBI and Detroit Police hand-held radios. Ross saw a silver-colored car in the Crawford driveway; the same car that he had seen at Mallory's girlfriend's house earlier that morning. The sister's house was on the west side of Plainview Road, north of Fenkell. The driveway was on the south side of the house, screened by a hedge approximately four feet high on the property line. From across Fenkell, Ross could see the top of the parked car above the hedge. Ross decided to stay. To undertake his surveillance, he parked his car on the east side of Plainview facing north, just south of Fenkell. Shortly thereafter, a blue Pontiac 6000 containing officers Richardson and Bloomfield and driven by Kaiser pulled up. Their unmarked car had been leased

by the FBI specifically for undercover use by the Task Force and they were equipped with a portable blue oscillating light and FBI and Detroit Police hand-held radios. The Pontiac was not equipped with alternating flashing lights or a siren, as was Ross's car. Government witnesses testified that the rented vehicle which Kaiser drove was not intended for use as an emergency vehicle pursuant to MCL 257.603; MSA 9.2303, *infra*. Ross explained to the others that he planned to monitor the house briefly, in case someone leaving or entering it might lead him to information concerning Mallory. After less than ten minutes of conversation among the officers the Pontiac departed, leaving Ross alone in his car to watch the house.

Within fifteen minutes after the Pontiac had departed, and just as Ross was himself preparing to leave, he saw the heads of two persons getting into the silver car parked in the Crawford driveway. The car then emerged from the driveway and proceeded south on Plainview towards Ross. As the car passed through the intersection at Fenkell and approached Ross' car, he was able to clearly see that there were two persons in the car, and that Mallory was driving, with a woman in the front passenger seat. When the two cars were roughly parallel, Mallory apparently recognized Ross from their prior meeting, accelerated, and sped away down Plainview. Ross immediately turned his car around to commence pursuit. He activated his flashing hazard lights and siren and placed the portable blue oscillating light on the dashboard. He first radioed Kaiser on his hand-held radio for assistance, giving Mallory's direction and a description of the car. Ross could not personally request back-up assistance from marked Detroit Police units because he was unfamiliar with the Detroit Police code system. He could, however, hear police officer Richardson relaying his information to the Detroit Police dispatcher over the Detroit Police radio. During this period, Mallory remained fully within Ross's view as Mallory turned right

onto Outer Drive and then left, southbound on Evergreen Road. Ross testified that his intention was to maintain eye contact on the suspect, and to continue to broadcast his whereabouts, but not to attempt an arrest. In response to Ross' radio call, Richardson informed Ross via the Detroit Police radio, that he and Kaiser were near Interstate 96 and Evergreen and would turn north on Evergreen to meet him and the Mallory car. Ross also used his FBI radio to inform any other FBI agents in the vicinity, as well as FBI central dispatch, of Mallory's location.

Meanwhile, Mallory continued south on Evergreen approaching speeds estimated as high as 70-90 miles per hour between intersections. He slowed at the intersections, however, in order to maneuver his car through traffic. Ross testified that his FBI car reached speeds of 40-50 miles per hour, which was fast enough to keep Mallory in view.

As Kaiser's car proceeded north on Evergreen, its occupants spotted Mallory's silver car approaching them at the intersection of Schoolcraft and Evergreen. Before Kaiser reached that intersection, at mid-block, he placed a blue oscillating light on the dash of his car and turned a sharp left, maneuvering across the center lane so as to block the two southbound lanes of Evergreen. All three officers exited that vehicle as Mallory came through the intersection of Schoolcraft against a red traffic signal. Richardson ran to the front of their car with revolver and badge drawn and identified himself as a policeman to Mallory's oncoming car. Mallory had deaccelerated [*sic*] somewhat, coming through the intersection. As he approached Richardson in the street behind the blue Pontiac, however, he sped up, swerving in an apparent attempt to run Richardson down. Richardson dove out of the way to avoid being hit, but not before noticing what appeared to be a handgun in Mallory's lap. Mallory then drove around the Kaiser car, entering the northbound lane of traffic in so

doing, and bypassed the obstacle altogether, speeding south.

Ross was several car lengths behind Mallory when he witnessed the apparent attempt at a stop. Then, after observing that Mallory had not been stopped, Ross also continued past Kaiser's car to keep Mallory in sight. Kaiser and the others returned to their car and proceeded south on Evergreen, far behind both Mallory and Ross, and did so without exceeding the posted speed limit or going through any red traffic signals. Mallory's car continued down Evergreen until it came to a crashing halt in the intersection of Joy and Evergreen Roads. After disregarding a red traffic signal, Mallory broadsided the vehicle driven by plaintiff Francis Tomcsik, which had been heading east across the intersection, with a green light on Joy Road. Ross was still about a block behind, but saw the accident occur. As he approached the accident scene, Ross also observed Mallory climb across the woman in the passenger seat and out of the window of his car, and run into an alley. No marked police cars had yet arrived. Ross then stopped his car and undertook pursuit of Mallory on foot. He cornered Mallory in the alley and, after a struggle, subdued, arrested, and returned him to the scene of the accident. By that time, Kaiser's car and several marked police cars were on the scene.

Mr. Tomcsik has brought his claim under the Federal Tort Claims Act, 28 U.S.C. § 1346, *et seq.* (the Act) which states in pertinent part:

> (b) Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of

> the Government while acting within the scope of his office or employment, under circumstances where the United States, if a person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Pursuant to the terms of the Act, a federal court is bound to apply the law of the jurisdiction in which the alleged tort occurred. *Fries* v. *United States*, 170 F.2d 726 (6th Cir. 1948). Therefore, it is Michigan law to which this Court must look in ascertaining whether a negligent act or omission has been established in this case. *State Use of Burkhardt* v. *United States*, 165 F.2d 869 (4th Cir. 1947).

The standard under which the facts of a case such as this must be analyzed in Michigan was announced by the Michigan Supreme Court in *Fiser* v. *City of Ann Arbor*, 417 Mich. 461; 339 N.W.2d 413 (1983). On facts analogous in many respects to those presented here, the Michigan Supreme Court held, *inter alia*, that to avoid governmental liability for injuries to an innocent citizen resulting from a collision during hot pursuit, it must be shown that the officers and agents of the defendant governmental body acted as a reasonably prudent officer would have acted under similar circumstances. Thus, the standard of care owed by the defendant in this case is one of reasonable prudence under all of the circumstances.

The facts before the court in *Fiser* were as follows: On an early October morning, the plaintiff was struck and severely injured by an automobile being chased by the City of Ann Arbor Police. Plaintiff was travelling south on South Main Street. Simultaneously, an automobile driven by Michael Lehman was travelling east on Madison Street, and was being pursued by a fully marked police car with its affixed overhead oscillating lights and emergency siren activated. During that chase, both of the latter two vehicles

had attained speeds of up to 110 miles per hour through both residential and business areas. Disregarding a flashing red traffic signal, Lehman had sped through the intersection of South Main and Madison without stopping, and struck plaintiff's car.

That high speed chase had commenced with the officers' attempt to stop Lehman for failing to stop at a flashing stop signal. At one point during the pursuit, Lehman's car had been struck by a police car and temporarily halted, only to speed away again after one of the officers had emerged from their car to approach Lehman. The officer remaining in the police car continued the pursuit, even to the extent of chasing Lehman the wrong way down a one-way street before losing sight of him. A third officer, also driving a fully marked unit, after hearing a radio report sighted Lehman and joined the pursuit, which was terminated only when Lehman struck that plaintiff's car broadside at the Madison/South Main intersection.

In that case the Supreme Court of Michigan determined that substantial questions of material fact existed, requiring jury determination of whether the officers violated the standard of care due the plaintiff by the city; whether there was an emergency sufficient to justify exposure of citizens to such risk; and whether the officers proximately caused plaintiff's injury. The court also provided clear standards for resolution of such questions in Michigan.

The gravamen of plaintiff's complaint in the instant case, as it was in *Fiser*, is that the government's agents acted negligently in this pursuit. The Michigan Supreme Court, in *McKay v. Hargis*, 351 Mich. 409; 88 N.W.2d 456 (1958), set the standard by which a claim of a police officer's negligence is to be determined. The conduct of an officer should be compared to "that care which a reasonably prudent man would exercise in the discharge of official duties of like nature under like circumstances." *Id.* at 418.

It first must be noted that, under the Michigan statutory scheme, authorized emergency vehicles are granted exemption from compliance with certain of the rules of the road where certain conditions are met. MCL 257.603; MSA 9.2303 provides in pertinent part:

> (b) The driver of an authorized emergency vehicle when responding to an emergency call, but not while returning from an emergency call, may exercise the privileges set forth in this section, subject to the conditions of this section.
>
> (c) The driver of an authorized emergency vehicle may:
>
> (1) Park or stand, irrespective of the provisions of this act.
>
> (2) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation.
>
> (3) Exceed the prima facie speed limits so long as he does not endanger life or property.
>
> (4) Disregard regulations governing direction of movement or turning in specified direction.
>
> (d) The exemptions granted in this section to an authorized emergency vehicle shall apply only when the driver of the vehicle while in motion sounds an audible signal by bell, siren, air horn, or exhaust whistle as may be reasonably necessary except as provided in subsection (e), and when the vehicle is equipped with at least 1 lighted lamp displaying a flashing, oscillating, or rotating red or blue light visible under normal atmospheric condi-

> tions from a distance of 500 feet in a 360° arc . . . .

Further, MCL 257.632; MSA 9.2332 states:

> The speed limitation set forth in this chapter shall not apply to vehicles when operated with due regard for safety under the direction of the police when traveling in emergencies or in the chase or apprehension of violators of the law or of persons charged with or suspected of a violation, nor to fire department or fire patrol vehicles when traveling in response to a fire alarm, nor to public or private ambulances when traveling in emergencies * * * . This exemption shall not however protect the driver of the vehicle from the consequences of a reckless disregard of the safety of others.

The *Fiser* court determined that, in order for the provisions of MCL 257.632; MSA 9.2332 to apply, the officers must show that they reasonably believed an emergency existed. *Fiser*, at 471-72. The question of "[w]hether or not there was an emergency (or circumstances warranting the driver's belief that there was) bringing into play the provisions of the applicable statutes . . . is a matter of fact." *Hoffmaster* v. *McNett*, 2 Mich. App. 709, 711; 141 N.W.2d 352 (1966), *quoted in Fiser*, at 472.

However, even if excused by the statutes from obeying all of the traffic ordinances, emergency vehicles must be operated with due regard for the safety of others. *Kalamazoo* v. *Priest*, 331 Mich. 43, 46; 49 N.W.2d 52 (1951), *cited in Fiser*, at 472. Hence, the existence of an emergency is but one of several factors which must be reviewed in determining whether an officer's actions were reasonable. Among the additional factors are "the speed of pursuit, the area of the pursuit, weather and road conditions, the presence of

pedestrians and other traffic, the presence or absence of audible and visible warnings, and the reason the officers were pursuing the fleeing vehicle." *Fiser*, at 472.

The pursuit in the instant case took place at 11:00 a.m. on a summer weekday morning and lasted for approximately 2.8 miles. The sky was clear and the pavement dry. The street on which most of the pursuit and the accident itself took place, Evergreen, is lined by homes set back from the street, and small businesses. In a pretrial deposition, Ross stated that the traffic was "heavy" on August 28th. At trial, Ross qualified his previous testimony by explaining "heavy" traffic to mean "not rush-hour", but heavy for an August mid-morning. There was no evidence introduced to suggest that the volume of traffic was anything other than as Ross credibly testified. Indeed his testimony was credible to the Court in all respects.

Plaintiff contends that Ross' pursuit of Mallory was unnecessary and reckless under the circumstances or that no emergency existed. In this regard, plaintiff offered the expert testimony of Mr. Louis Reiter, a consultant in police procedures. As one familiar with high speed pursuits and the policies necessary to conduct them safely in California, Rieter [*sic*] stated that the FBI's reliance upon local law for policies governing an officer's conduct during pursuits is insufficient. It was his opinion that written policies, specific to the FBI itself in all jurisdictions, were necessary to give officers adequate guidance in the field. When Rieter [*sic*] was a member of the Los Angeles Police Department, a written policy regarding vehicle pursuit was in effect. Special Agent John Anthony of the FBI testified that the FBI's policy was to have no written policy with regard to vehicle pursuits. Agents are instructed to follow the law of the locality in which they are operating. Because the FBI policy-making function is a discretionary one, it cannot be the basis for liability under the Federal Tort Claims Act.

The testimony was clear, moreover, that Detroit FBI agents are provided and fully instructed on applicable Michigan law and Detroit Police Department policy, both of which are written.

Reiter then opined that, on the basis of the facts as he understood them to be in this case, Ross did not act as a reasonably prudent officer should in conducting the pursuit. He believed that the circumstances presented a high risk situation which made the very undertaking of a pursuit negligent. An accident was highly likely to occur given Mallory's estimated speeds of 70-90 miles per hour. Reiter found Ross negligent initially in undertaking a pursuit in a one-man, unmarked and poorly equipped car. Next, he argued that Ross was uncertain as to the whereabouts of his partner and, if nothing else, a shootout was likely. Reiter also stated that Kaiser's attempt to stop Mallory near Schoolcraft was negligent because it was impossible for one car to block traffic to the point of stopping Mallory. Kaiser and Richardson exposed both themselves and the public to too great a threat of harm by simply forcing Mallory into oncoming traffic. Their failed attempt at a stop also spurred him on to drive even faster. Also, Richardson had seen a gun either in Mallory's lap or in his hand, yet never informed Ross of the fact. Reiter concluded his direct testimony by stating that the safety of the public and of the officers themselves was more important than capturing the suspect, under the circumstances, and that he should have been permitted to escape and left for capture on a more auspicious occasion. He also suggested the use of helicopters and a converging team of numerous police vehicles; as more reasonable.

As its expert, the government called Dr. Isaiah McKinnon, who holds a doctorate in Criminal Justice, is a nineteen year command veteran of the Detroit Police Department, and is now Director of Security of the Uni-

versity of Detroit. After reviewing the materials as Reiter did, Dr. McKinnon concluded that Ross, Kaiser, and all of defendant's agents acted as reasonably prudent officers should, under all of the circumstances of this case. Having trained officers and participated in car stops and pursuits in this very community, McKinnon was very familiar with the policies of Detroit and Michigan State Police, Michigan law, and the guidelines set out in *Fiser*. He determined that, by all of those standards, these officers were not negligent either in initiating or conducting this pursuit.

Dr. McKinnon opined that under the circumstances, Ross acted prudently, performing appropriately under both local police guidelines and the precepts of *Fiser*. Mallory was a highly wanted, dangerous criminal, and Ross had most recently been searching for him for about six months at the time of the accident. After this capture, Mallory was successfully prosecuted for a serious felony and is today in prison. Contrary to the testimony of Reiter, Dr. McKinnon did not believe Kaiser's failed attempt to stop Mallory was ngeligent. First, it did not pose a serious threat of harm to the public because, according to the testimony, all traffic was stopped or stopping for a red traffic signal at Schoolcraft when Kaiser conducted his mid-block maneuver. Only Mallory was moving on Evergreen at that point.

Dr. McKinnon also testified that it is most unlikely that the attempted stop had actually been a catalyst in propelling Mallory even faster into the plaintiff as claimed, because Mallory had been aware that he had been seen and was being followed since he first saw Ross surveilling his sister's house. Police guidelines call for discontinuance of a pursuit if a clear and present danger to the public exists. This situation did not rise to that level until, unfortunately, Mallory for the first time saw fit to speed straight through an intersection at Joy Road, on which plaintiff was travelling.

A threshold question in determining whether the defendant was negligent in this case is whether the excusatory provisions of MCL 257.632; MSA 9.2332 are applicable. As noted earlier, that statute only applies if indeed an emergency existed, or there were circumstances which warranted the belief that an emergency did exist. *Fiser, supra.*

In the case at bar, the government has amply met its burden of showing that an emergency existed. There can be no dispute that Farod Mallory was a violent and dangerous wanted felon, intimately associated with the notorious Young Boys, Inc. gang which dealt in illegal drugs and death. Ross was familiar with Mallory's participation in the gang as an enforcer; a member of what was known as the "A-Team". From mid '84 through mid '85 and for six months of '86, Ross had searched for him. He knew that Mallory travelled between and among several states other than Michigan to evade arrest. He had safe-houses and contacts in several cities.

Plaintiff has argued that the second search for Mallory, undertaken in 1986, was not as difficult as has been claimed because reports had been made to the FBI from informants in the drug world that Mallory had been seen in Detroit during the weeks just prior to August 28, 1986. Assuming, *arguendo*, that the information was true and that Mallory was on occasion in the city, the fact is that Mallory remained a fugitive and that the best efforts of the Task Force had failed to locate him. To say that Mallory could have been apprehended another day because he had previously been sighted in the city ignores the reality of the situation; that Mallory had eluded law enforcement up to that point, and was a person whose capture was a matter of significant governmental priority. His free presence in the city presented a very substantial danger to the populace. It was reasonable, under the circumstances, for Ross

to conclude that this was an emergency situation triggering the excusatory provisions of MCL 257.632; MSA 9.2332, and this Court finds as a matter of fact and law that it was. The situation is totally distinguishable from that of *Fiser*, in which the chase had developed from a simple attempted traffic stop.

Having determined that an emergency existed, the Court now turns to the question of whether this pursuit was conducted with due regard for the safety of others.

On the pursuit course, which was lined with residences and small businesses, Mallory reached speeds estimated at 70-90 miles per hour between intersections and Ross testified that he maintained his own speed between 40 and 50 miles per hour. The speeds were not nearly so high as those reached in *Fiser*, although the emergency was far greater, and the road and weather conditions were favorable. There was no testimony introduced to even suggest that any near accidents or indications of total disregard for public safety occurred prior to the intersection where plaintiff was struck.

Ross testified that he engaged his siren, hazard lights and his blue oscillating light immediately upon commencing the pursuit. Special Agents Kaiser and Richardson, however, testified in their depositions that they did not see the blue light or hear the siren as Ross approached them near Schoolcraft. They later changed their deposition testimony, and plaintiff has suggested that their testimony is incredible, as an effort to conform their narratives to Ross'. The changes did not, however, significantly alter the testimony to the point that credibility is affected. The changes merely offer the reasons why the agents may not have heard or seen the signals during this rapidly developing emergency situation. As Kaiser pulled into the southbound lane, the windows in his car were rolled up and the police radios were on. It is very possible, therefore, that Kaiser

and Richardson would not hear the siren on Ross' car as he approached them near Schoolcraft. With regard to their failure to see a blue light in Ross' car, both Kaiser and Richardson admittedly were concentrating on Mallory's car as it was coming through traffic. Ross' light, far behind, could very well have been unnoticed by the agents. The tesitmony of all the agents may, in short, be reconciled. The testimony was clear, moreover, that the oscillating lights, when placed on dashboards, meet the visibility requirements of the statute.

Plaintiff also asserts that defendant was negligent because there had been no attempt to learn whether Mallory was in the house while Ross was surveilling it, before Ross was left alone. The testimony was uniform, however, that none of the agents had any reason to believe that Mallory was in the city, much less in his sister's house, at that time. Under the circumstances, it was reasonable to leave an agent alone on surveillance. Ross also stated that his intent when he turned behind Mallory was only to follow the car and maintain surveillance; to report Mallory's locations for assistance by marked vehicles in a capture. All government witnesses agreed that there was no intention whatsoever to attempt to arrest Mallory without the participation of a large team of agents and officers, both federal and local, with uniforms and marked vehicles.

As noted earlier, the length of the pursuit was approximately 2.8 miles: not long. Traffic conditions were at their safest. The speeds were substantially lower than those in *Fiser*. Ross testified that his emergency equipment was activated at the outset of the pursuit and both FBI and police central officers were given notificaton. MCL 257.603; MSA 9.2303, *supra*, sets forth the requirements for operation of authorized emergency vehicles in emergency situations. Plaintiff contends that the vehicles driven by agents Ross and Kaiser did not comply with the statute and that such

non-compliance was negligent. To the contrary, the Court finds that Ross' car was sufficiently equipped to fall within the parameters of the staute. Ross' vehicle had an audible siren, flashing emergency lights, and a blue oscillating light visible at 500 feet. With regard to Kaiser's vehicle, the Court finds that its minimal involvement in the pursuit and observance of the traffic laws did not require that it have the full complement of emergency equipment. It neither reached the speeds Ross [*sic*], nor did it proceed against any traffic signals or attempt to keep up with the other vehicles. When used to block traffic, however, it did display the oscillating blue light.

Although the scenarios of *Fiser* and the instant case are similar, there are important differences. Unlike *Fiser*, the agents in this case never pursued the suspect against a one-way street or against lanes of traffic. Police vehicles were operated safely at all times. The road conditions in *Fiser* were poor due to rain. Here, the streets were dry. The speeds attained by both the suspect and the police in *Fiser* exceeded those attained in the case at bar. Eye contact with the suspect was lost in *Fiser*, while the suspect was maintained in view throughout this entire pursuit. Perhaps the most important distinction between the two cases, however, is that Farod Mallory was clearly and undisputedly more than a mere traffic violator or common street thug. He was a member of a notorious gang involved in illegal drug trafficking and murder, and presented a serious threat to the public. Knowing that Mallory was wanted for violent crimes, it was most reasonable to continue the pursuit. His subsequent guilty plea to one count of murder of an indictment under the RICO statute and his current incarceration for that murder confirms Ross' concern.

Plaintiff relies upon the eyewitness testimony of Mrs. Royetta King, to support his contention that Ross was negligently travelling faster than the 40-50 miles per hour that

he claims. Mrs. King testified that she saw a car in pursuit about two cars behind Mallory's at the intersection of Evergreen and Joy, the scene of the accident. Plaintiff argues, therefore, that Ross could not have been a quarter mile away as he claimed (although it is undisputed that Ross did overtake the Mallory vehicle, eventually), and therefore that he was travelling as rapidly as Mallory. Mrs. King, however, described the car she believed to be Ross' as black or dark blue, with two persons inside. Ross' car was in fact blue, but it was two-toned blue and predominantly a very light blue. Ross was also, undisputedly, the only person in his car. Mrs. King had been much surprised by the car chase, the accident, and the subsequent armed foot chase, however, and her recollections of these events cannot be given more credit than those of the agents. There are too many significant differences between the facts and Mrs. King's recollection to fully credit her testimony as identifying the Ross car. The car that she saw two car lengths behind Mallory's does not appear to have been Ross'. Moreover, as noted above, that fact is not a necessarily material one, as it is undisputed that Ross finally caught up, eventually, and overtook Mallory's car at the accident intersection.

Inherent in much of law enforcement activity is the risk that innocent citizens will be harmed by the pursuit of criminals. That risk must be balanced against the even greater certainty of greater damage which flows from governmental failure to enforce the law, or abdication of that responsibility. Implicit in the Michigan Supreme Court's holding in *Fiser* is the need to balance the objectives and necessities of vigorous law enforcement with the safety of the public. Indeed, law enforcement itself is a public safety function. The need to balance the interest of the individual citizen in security from injury by law enforcement against his interest in security from crime has been fully

considered by Congress as well, and its priorities are reflected in the provisions of the Federal Tort Claims Act. Under the provisions of that Act, the United States government may be held liable only for a *negligent* act or omission of its agents. Congress has determined that only negligent acts may result in governmental liability, and that each of us as individual citizens must bear the burden of injuries otherwise sustained, as a result of our government's efforts to enforce the criminal laws. It is not the role or privilege of this Court to re-order the priorities clearly established by Congress. It may not permit sympathy in the difficult case at hand to destroy the effect of choices made by more representative branches of government.

The events giving rise to this lawsuit are tragic. The Court, however, cannot conclude that the defendant, through its agents, has acted negligently. The agents were called upon to exercise their judgment in an emergency situation and did so with reasonable prudence.

IT IS ORDERED, THEREFORE, that plaintiff's complaint be and it hereby is dismissed.

/s/ Anna Diggs Taylor
United States District Judge

Dated: SEPTEMBER 11, 1989